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Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1239

CITIZENS BANK OF HATTIESBURG; M. D. BRETT and J. W. MANGUM,

Petitioners,

versus

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES
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No. .....

CITIZENS BANK OF HATTIESBURG; M. D. BRETT and J. W. MANGUM,

Petitioners,

versus

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioners, Citizens Bank of Hattiesburg, Mississippi, a Mississippi banking corporation, and M. D. Brett and J. W. Mangum, stockholders of the First National Bank of Hattiesburg, Mississippi, a national banking corporation, respectfully pray that a writ of certiorari be issued to review the decisions of the United States Court of Appeals for the Fifth Circuit entered on December 4, 1967, on direct appeal and on January 18, 1968, on petition for rehearing en banc or for rehearing, which affirmed judgment of the United States District Court for the

Hattiesburg Division of the Southern District of Mississippi, and which judgment held that the complaint was without merit and should be dismissed.

I.

JURISDICTION.

Jurisdiction to review this case on petition for writ of certiorari is conferred upon this Court by 28 U.S.C., Section 1254 (1), and Supreme Court Rule 19(1)(b).

II.

OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of Mississippi (Harold Cox, J.) (R. 791) does not appear in the official reporter system but copy thereof is attached hereto as Appendix "A"; and the judgment thereon is printed in the record (R. 801) and copy thereof is attached hereto as Appendix "B".

The opinion of the Court of Appeals for the Fifth Circuit (Rives, J.) does not appear in the official reporter system but copy thereof is attached hereto as Appendix "C"; and copy of the judgment of the Court of Appeals for the Fifth Circuit is attached hereto as Appendix "D" and copy of the order of the Court of Appeals denying petition for rehearing en banc or for rehearing is attached hereto as Appendix "E".

III.

STATEMENT OF GROUNDS FOR JURISDICTION.

The grounds on which jurisdiction of this Court is invoked are:

(a) That the Circuit Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same subject matter; and (b) said Court has decided an important question of federal law which has not been, but which should be, settled by this court; and (c) said Court has rendered its opinion in conflict with applicable decisions of this Court; and (d) said Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings and has followed the United States District Court in the cause to justify and require the exercise of the power of supervision of this Court; and pursuant to Supreme Court Rule 23(b), petitioners further say:

(i) The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was dated and entered December 4, 1967.

(ii) Said Court entered order respecting a rehearing dated and filed January 18, 1968; and said Court of Appeals, on application therefor, entered order to stay the mandate pending the filing of this petition for writ of certiorari for a period of 60 days from January 28, 1968, and the stay will continue thereafter provided this petition for writ of certiorari is filed

within said 60 day period and a certificate of the Clerk of the Supreme Court of the United States has been filed with the Clerk of the United States Court of Appeals for the Fifth Circuit.

(iii) The statutes primarily involved are the provisions of the National Bank Act authorizing the Comptroller of the Currency to issue certificates permitting the opening for business of national banks (12 U.S.C.A., §§ 26 and 27) copy thereof being attached hereto as Appendix "F"; the provision of the National Bank Act regulating the establishment of branches by national banks (12 U.S.C.A., § 36(c)), copy thereof being attached hereto as Appendix "G"; certain sections of the Federal Administrative Procedure Act (5 U.S.C.A., § 551, et seq.), copy of Section 554 and 556 thereof being attached hereto as Appendix "H"; and provisions for judicial review (5 U.S.C.A., § 701, et seq.), copy of applicable § 702 and § 703 being attached hereto as Appendix "I".

IV.

QUESTIONS PRESENTED.

The questions presented by this petition are:

1. Did the Citizens Bank of Hattiesburg and M. D. Brett and J. W. Mangum, stockholders of the First National Bank of Hattiesburg, identifying two competing banks, have court standing to challenge the chartering of a new national bank by the Comptroller

of the Currency in the City of Hattiesburg, Mississippi?

2. Do the courts have right to review the actions of the Comptroller of the Currency in chartering new national banks, and, if so, what is the extent of such review?

3. Do existing conflicts and controversies of the District Courts and of the Circuit Courts of Appeals of the United States and with this Court suggest public need for review and announcement of controlling principles of law relating to chartering of new national banks in the United States?

4. Under the National Bank Act, do competing banks have right of trial de novo before United States District Courts challenging decisions of the Comptroller of the Currency relating to granting of new national bank charters?

5. Does the Federal Administrative Procedure Act of the United States apply to the Comptroller of the Currency?

V.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

The constitutional provisions are: The Fifth Amendment to the Constitution of the United States respecting due process affecting property rights; the Four-

teenth Amendment to said Constitution respecting due process and equal protection of the law, pertinent parts thereof being set forth in Appendix "J" attached hereto; Acts of Congress being the National Bank Act, 12 U.S.C.A., §§ 26 and 27 and 36(c), and the case also involves the application of the Federal Administrative Procedure Act (copies of these statutes are attached hereto as Appendix "H" and "I").

Also involved is Rule 56(c) of Federal Rules of Civil Procedure, which reads as follows:

> "(c) Motion (for summary judgment) and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

VI.

STATEMENT OF CASE.

The Citizens Bank of Hattiesburg is a Mississippi banking corporation located in the City of Hattiesburg, Mississippi. M. D. Brett and J. W. Mangum are stockholders of the First National Bank of Hattiesburg, a national banking corporation. The petitioner bank and the First National Bank of Hattiesburg were the only banks in Hattiesburg, Mississippi, prior to the advent of the so-called "Southern National Bank." These two banks each had two branch banks within the corporate limits of Hattiesburg, Mississippi, and each of them had one additional branch in the unincorporated village of Petal, Mississippi, which adjoins the corporate limits of Hattiesburg, Mississippi. On January 7, 1965, application was made for the new charter and a national bank examiner covering the area was assigned to investigate, with result that he recommended the disapproval of the application. The Comptroller of the Currency failed to follow the Federal Administrative Procedure Act. He failed to recognize the laws of the United States and the State of Mississippi relating to competitive equality between state and national banks. He refused to apply the principles of due process and, we say, acted arbitrarily or otherwise illegally in attempting to grant the new charter and that his acts were capricious, arbitrary and illegal; but the Comptroller did in fact issue charter for the establishment of the new bank on August 18, 1965, after the suit here had been filed on June 8, 1965.

The complaint of petitioners filed in the United States District Court for the Hattiesburg Division of the Southern District of Mississippi was for declaratory judgment. The defendant, James J. Saxon, Comptroller of the Currency, filed motion to dismiss the complaint or in lieu thereof for summary judgment. The judgment of the court was really summary in nature and partially, if not totally, influenced by motion for summary judgment.

The only opportunity for hearing prior to issuing charter was in the office of the Deputy Comptroller of the Currency in the afternoon of April 16, 1965 (Good Friday); and that hearing was so limited that the attorney for the Deputy Comptroller announced in the beginning that each side would have 15 minutes for presentation of their respective positions with no right of cross-examination; and the so-called hearing was adversary but with no notice thereof to petitioners or their representatives or attorneys. The chief counsel for the Comptroller advised that it was not the practice of the Comptroller's office to "write" "opinions" covering disposition of application for new national banks.

FEDERAL JURISDICTION.

There is here involved a review of the judgment of the Federal District Court and the Court of Appeals. The federal jurisdiction is based upon Sections 1331, 1348 and 1394 of Title 28, Sections 551, et seq., and Sections 701, et seq. of Title 5, and Section 27 of Title

12 and other sections of the chapter of said Title 12, all of the United States Code Annotated.

ON QUESTION OF STANDING IN COURT.

The Comptroller of the Currency claims that neither the Citizens Bank of Hattiesburg nor M. D. Brett and J. W. Mangum, stockholders of the First National Bank of Hattiesburg, had standing to challenge the chartering of a new national bank. The Circuit Court of Appeals refused to pass upon this question with statement that, "We need not decide the question of whether a competing bank and stockholders of a second competing bank have standing to challenge the chartering of a new national bank for, assuming such standing arguendo, we agree with the district court that the complaint is without merit." Attorneys for the Comptroller cited authorities to support this theory: *Alabama Power Co. v. Ickes*, 302 U.S. 464; *Tennessee Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 137-41; *Rural Electrification Administration v. Central Louisiana Elec. Co.*, 354 F.2d 859 (C.A. 5), certiorari denied, 385 U.S. 815; *Kansas City Power & Light Co. v. McKay*, 225 F.2d 925 (C.A.D.C.), certiorari denied, 350 U.S. 884.

The decisions in conflict with that contended for the Comptroller of the Currency appear from other Circuits, including the Fourth and Eighth Circuits. We furnish short quotes from each of these jurisdictions.

> "We hold, too, that the bank's competitors have standing to seek the review, not because of the

potential sharpening of competition, but because they have an immediate concern, apart from the public generally, to prevent an approval contrary to law. Thus they are 'interested' within the purpose of § 1004(b), APA." *First National Bank of Smithfield, N. C. v. Saxon,* (CCA 4th) 352 F.2d 267.

"We believe that competing banks, as interested parties, have a right to challenge illegal acts of the Comptroller and that the Comptroller's discretionary acts are not immunized from judicial review." *Webster Groves Trust Co. v. Saxon,* (CCA 8th) 370 F.2d 381.

The Comptroller of Currency, in issuing a certificate to a new national bank, should make a determination of public convenience and necessity. This being true, the public and competing banks have a particular interest in the findings of the Comptroller of Currency on the question of public convenience and necessity so that the banking structure in the community may remain sound. *Hardin v. Kentucky Utilities Company,* 88 S.Ct. 651.

ON RIGHT OF JUDICIAL REVIEW OF ACTION OF COMPTROLLER.

The case of *Webster Groves Trust Co. v. Saxon, supra,* is authority for right to review actions of the Comptroller. In that case from the Eighth Circuit the court stated:

> "Therefore, we do not believe the courts are powerless to protect the public from unconstitutional, illegal, or otherwise arbitrary activities of administrative officials. The Comptroller is free to exercise his discretion in the granting of charters, free from any review on the merits of his action. However, if the Comptroller acts in excess or abuse of his legal authority, to this extent his actions are subject to judicial review, with the burden of proof resting on the party seeking the review." *Webster Groves Trust Co. v. Saxon, supra.* See also *Farris v. Indian Hills National Bank*, (Neb.), 244 F.Supp. 594.

After quoting from 5 U.S.C.A., § 1009 of the Administrative Procedure Act, now 5 U.S.C.A., § 509, the District Court for the Western Division of Michigan said of this:

> "The Comptroller's decisions are therefore reviewable. Commonwealth Natl. Bank v. Saxon, 310 F.2d 224 (CCA 6, 1962); Commercial Security Bank v. Saxon, 236 F.Supp. 457 (D.D.C. 1964)." *American Bank and Trust Company v. Saxon* (CCA 6, 1965) 248 F.Supp. 324, 373 F.2d 283 (Reversed on other grounds).

The Circuit Court of Appeals for the Sixth Circuit said of this:

> "The District Judge's review of the Comptroller's action was made under the standard of the

> Administrative Procedure Act, 5 U.S.C., Section 1009. We agree that this record discloses 'an abuse of discretion' in defendant Comptroller's grant of the disputed certificate of authority to defendant Manufacturers National Bank of Detroit." *Bank of Dearborn v. Saxon*, 377 F.2d 496. See also *First National Bank of Smithfield, N.C. v. Saxon, supra.*

The opinion of the Circuit Court of Appeals in this cause held that, "The court may not substitute its judgment for that of the Comptroller"; but in the case of *Peoples Bank of Trenton v. Saxon*, (CCA 6th) 373 F.2d 185, 188-189, the court said:

> "It was the District Court's mandatory duty to conduct an adversary hearing and to determine upon the whole record in a de novo proceeding whether the Comptroller's decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Peoples Bank of Trenton v. Saxon, supra.*

On this same point, it is well to consider the recent cases of this Court affording a party a judicial review where he would be adversely affected by an administrative ruling. *Hardin v. Kentucky Utilities Company, supra; Penn-Central Merger and N & W Inclusion Cases*, 88 S.Ct. 602; *Denver & Rio Grande Western Railroad Co. v. The United States*, 387 U.S. 485, 18 L.Ed.2d 905, 87 S.Ct. 1754; *Udall v. Federal Power Commission*, 387 U.S. 428, 18 L.Ed.2d 869, 87 S.Ct. 1712; *Abbott Laboratories v. Gardner*, 387 U.S.

136, 18 L.Ed.2d 681, 87 S.Ct. 1507, and *Gardner v. Toilet Goods Association*, 387 U.S. 167, 18 L.Ed.2d 704, 87 S.Ct. 998.

DECISIONS IN ABOVE CAUSE IN CONFLICT WITH DECISIONS OF OTHER COURT OF APPEALS.

In the case of *Bank of Dearborn v. Saxon, supra*, the Court of Appeals for the Sixth Circuit affirmed the District Court judgment, and the District Court had said of this that:

> "If, indeed, it were true that his admittedly broad discretion were combined with his doctrine of unreviewability of the exercise of his discretion, plus the complete secrecy of his files relating thereto, a constitutional question of the first magnitude would be presented, since the possessor of such powers would be unassailable in any court by any process. We are aware of no sueh sanctuary in American constitutional law, nor do we believe that the Congress ever sought to confer it." *Bank of Dearborn v. Saxon*, 244 F.Supp. 394, 401.

There is also conflict with the Supreme Court of the United States if the opinion of the Circuit Court of Appeals in this cause is permitted to stand. We cite the case of *First National Bank of Logan, Utah v. Walker Bank & Trust Company*, 385 U.S. 252, 17 L.Ed.2d 343, 87 S.Ct. 492.

ON TRIAL DE NOVO.

The record in the trial court discloses that no evidence on the issues raised were admitted. The court only admitted proffers (R. 716). In this cause, the trial judge stated that he did not think the burden was on the plaintiff "to dig up a record or go try to gouge out of this Comptroller evidence that he may or not be willing to divulge." (R. 716.) The court further stated that if he heard the evidence, he might "conclude from" the evidence that applicants were not "entitled to a charter." (R. 726.) The trial court further stated that we were not permitted to have a factual hearing (R. 751). The Circuit Court of Appeals for the Fifth Circuit in this case held that, "The action of the Comptroller is not subject to review by trial de novo. The Court may not substitute its judgment for that of the Comptroller." This is contrary to a decision of the Fourth Circuit as follows:

> "On the remand of this case, the plaintiff may adduce evidence demonstrating the impermissibility of the Comptroller's approval of a branch bank at Smithfield. Testimony to the contrary will be receivable from the Comptroller. The Court will then find the facts. Thereon, it will judge de novo the validity, in fact and in law, of the Comptroller's final action." *First National Bank of Smithfield, N. C. v. Saxon, supra.*

The Circuit Court of Appeals for the Sixth Circuit says of this:

> "The Comptroller's decision was arrived at without an adversary hearing, consequently there is no transcript or other record which reveals the findings and conclusions of the Comptroller incident to his decision. At the trial the Comptroller successfully urged the 'executive privilege,' thus barring disclosure of much of the evidence and the findings upon which he arrived at his judgment.
>
> "It is our opinion that the District Court proceeded according to law and that it would have been erroneous for the Court to have based its judgment merely upon review and analysis of the tenuous evidence disclosed by the Comptroller's file. It was the District Court's mandatory duty to conduct an adversary hearing and to determine upon the whole record in a de novo proceeding whether the Comptroller's decision was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Peoples Bank of Trenton v. Saxon, supra.*

APPLICATION OF FEDERAL ADMINISTRATIVE PROCEDURE ACT.

The Comptroller of the Currency did not comply with the Federal Administrative Procedure Act and we contend and believe that therein the Comptroller

first defaulted and failed. His refusal to follow the Act was unlawful, and that which he failed to do was by him arbitrary and capricious. If the Act has no application, the principles therein contained control to make possible administrative due process. Reference is made to Sections 702 and 703 of Title 5, U.S.C.A., and in the latter section there appears the alternative approach to require adequate judicial review.

> "The Comptroller, it is true, has a broad discretion with respect to the matters committed to his charge, including moves of branch banks. In this regard, he urges that the exercise of his discretion under these facts is not subject to judicial review, nor, in fact, are his files subject to scrutiny. Actually what he is arguing for is the complete invulnerability of his decisions. If, indeed, it were true that his admittedly broad discretion were combined with his doctrine of unreviewability of the exercise of his discretion, plus the complete secrecy of his files relating thereto, a constitutional question of the first magnitude would be presented, since the possessor of such powers would be unassailable in any court by any process. We are aware of no such sanctuary in American constitutional law, nor do we believe that the Congress ever sought to confer it." *Bank of Dearborn v. Saxon, supra* (District Court).

The Federal Administrative Procedure Act was in existence when the above opinion was written and when the case now before the Court was decided was 5 U.S.C.A., Section 1001, et seq. The new sections in said Code bear numbers 501, et seq. and these sections relate to judicial review. The *Bank of Dearborn* case was affirmed by the Circuit Court of Appeals for the Sixth Circuit and therein appears the following:

> "For the reasons outlined above and those set forth in more detail in the opinion of the District Court, Bank of Dearborn v. Saxon, supra, we affirm the District Court decree." *Bank of Dearborn v. Saxon, supra.*

This Court, in the case of *Wong Yang Sung v. McGrath*, 339 U.S. 33, in 1950, decided that deportation hearings were subject to the Administrative Procedure Act, even though the statute covering deportation did not require a hearing, on the ground that constitutional due process did require one. Since the granting of a charter to a new national bank by the Comptroller of Currency must, of necessity, be based upon a determination by the Comptroller that there is a convenience and necessity in the community for a new bank, it is necessary that he hold a hearing under the Administrative Procedure Act. In the rules published by the Comptroller, Section 4.2, "Organization of National Banks" (b)(3), in dealing with what has to be considered, it is provided:

> "The convenience and needs of the community to be served by the proposed bank."

In the case of *Riss & Co., Inc. v. United States,* 341 U.S. 907, where it was urged that the Motor Carrier's Act did not specifically require a hearing, this Court, nevertheless, held that it was necessary for the Interstate Commerce Commission to hold a hearing under the Administrative Procedure Act and reversed the ruling of the Lower Court.

VII.

REASONS RELIED ON FOR GRANTING WRIT.

The decision below permitted the granting of a certificate or charter for new bank by the Comptroller of the Currency upon theory that the District Court properly held that the court may not substitute its judgment for that of the Comptroller and that there was no right of trial de novo and that the Federal Administrative Procedure Act had no place in the controversy and that no formal adversary hearing was necessary or proper before or with the Comptroller, and that no testimony would be admitted in trial court to disclose that the Comptroller acted arbitrarily or otherwise illegally, contrary to right of judicial review (5 U.S.C.A., § 701 et seq.).

No consideration was given by the Court to the question of due process or the property rights of the complaining parties. Neither was there given consideration to the confusion countrywide created through acts of the Comptroller in field of granting charters to new banks or issuing certificates for branch banks.

This case presents important questions, not heretofore decided by this Court, relating to the standing of petitioners to challenge the chartering of a new bank; the reviewability of the action of the Comptroller; the conflict of decisions in the area or field involved between the opinion of the Circuit Court of Appeals for the Fifth Circuit and of other circuits; the question of whether or not a competing bank such as petitioner is entitled to a trial de novo; whether or not the Federal Administrative Procedure Act should apply in whole or in part, whether or not there exists right of judicial review, and whether or not this whole area of concern is of such importance because of controversy throughout the country in field of banks and banking to call for decision or direction in this area of public concern by the Supreme Court of the United States.

(1) The Circuit Court of Appeals was unwilling to decide the question of whether a competing bank and the stockholders of a second competing bank "have standing to challenge the chartering of a new national bank." Attorneys for the Comptroller had argued that no such right existed. The authorities identified in the foregoing Statement of Case and other authorities require the conclusion that the decisions of the several circuits are in discord; but the majority view and better-reasoned cases support the right in a competing bank to challenge the chartering of a new bank. *First National Bank of Smithfield, N. C. v. Saxon, supra; Webster Groves Trust Co. v. Saxon, supra; Bank of Dearborn v. Saxon, supra;*

Peoples Bank of Trenton v. Saxon, supra, and *Jackson v. First National Bank of Valdosta,* 349 F.2d 71.

(2) The Circuit Court of Appeals for the Fifth Circuit in this cause held that, "The action of the Comptroller is not subject to review by trial de novo. The Court may not substitute its judgment for that of the Comptroller." This opinion is contrary to the opinion in the case of *Webster Groves Trust Co. v. Saxon, supra,* wherein it was held that the administrative agency was not beyond court review and that the court should hear and consider evidence supporting charges of arbitrary or capricious or otherwise unlawful acts of the Comptroller. Other cases to the same effect are: *Peoples Bank of Trenton v. Saxon, supra; First National Bank of Smithfield, N. C. v. Saxon, supra; Peoples Bank of Trenton v. Saxon, supra; Bank of Dearborn v. Saxon, supra; Union Savings Bank v. Camp,* (CCA D.C.) 335 F.2d 718 (subsequent trial not yet in Reporter System); *United States v. First City National Bank of Houston* and *United States v. Provident National Bank* (consolidated), 386 U.S. 361.

> "But, as stated by the Solicitor General, 'The National Bank Act . . . makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record.' The courts, however, have held that judicial cognizance of a controversy with the Comptroller may be taken and judicial power exercised to keep the Comptroller within statutory bounds. Camden

Trust Co. v. Gidney, 112 App DC 197, 301 F2d 521; Union Savings Bank v. Saxon, 118 App DC 296, 298, 335 F2d 718, 720, and cases cited. That conclusion is consistent with our holding in Columbia Broadcasting System, Inc. v. United States, 316 US 407, 423-424, 86 L.ed 1563, 1574, 62 S.Ct. 1194, that, absent a congressional design to bar all judicial review (Switchmen's Union v. National Mediation Board, 320 US 297, 88 L ed 61, 64 S Ct 95), injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress." *Whitney National Bank v. Bank of New Orleans,* 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed.2d 386.

(3) The conflict of decisions identified with the conduct of the Comptroller are multiple in many areas. In the Statement of Case above we have given citations of confusing decisions respecting the standing of a competitive bank to challenge that done by the Comptroller of the Currency in establishing a new bank, and conflicts on right of review of actions of the Comptroller, and conflicts in decisions of the Supreme Court of the United States with a number of Circuit Courts which require the conclusion that there are many areas relating to banks and banking which are not understood by some courts and not understood by the litigants. This has resulted in great con-

fusion within the field of banks and banking. There is conflict between the opinion in the case here presented with other courts of some of the Circuits respecting right of trial de novo and right of review. To avoid duplication and repetition, we refer to all those cases and make them a part of this segment of this petition as much so as if again copied herein.

(4) There arises the question of whether or not the time has not arrived when some positive statement be made in the field of direction of the Comptroller of the Currency and his staff to comply with and conform to the Federal Administrative Procedure Act as far as same may be applicable to avoid further controversy and conflict and to stabilize this field of banks and banking. Existing public confusion results in public concern and need for expression from the Supreme Court of the United States in this area and in area of right of judicial review.

We would fail in proper perspective on the general issues here involved if we did not mention the question of competitive equality. Such has been ignored by the trial court. We were unable to furnish proof in this particular area. The court held that the action was not an adversary proceeding, not a plenary suit, and "it will not be that kind of a proceeding here." (R. 716.) The trial judge stated that it had "no power to charter national banks," but that it "might conclude from your evidence they wasn't entitled to a charter." (R. 726.) In connection with depositions presented to the court, the judge stated that, "I don't

know who advised him not to answer, but it was not a proper piece of advice." (R. 761.) We have thought that we were entitled to furnish evidence in the whole field and particularly in the field of competitive equality.

> "As a result of the passage of this act, the national bank act has been so amended that national banks are able to meet the needs of modern industry and commerce and competitive equality has been established among all member banks of the Federal Reserve System. * * *
>
> "The Comptroller argues that Utah's statute 'expressly authorizes' state banks to have branches in their home municipalities. He maintains that the restriction, in the subsequent paragraph of the statute limiting branching solely to the taking over of an existing bank, is not applicable to national banks. It is a strange argument that permits one to pick and choose what portion of the law binds him. Indeed, it would fly in the face of the legislative history not to hold that national branch banking is limited to those States the law of which permits it, and even there 'only to the extent that state laws permit branch banking.' " *First National Bank of Logan, Utah v. Walker Bank & Trust Company, supra.*

CONCLUSION.

The case presents important and substantial questions of the administration and application of the National Bank Act and of the rights of a competing bank to go into court and and seek the review of the actions of the Comptroller of the Currency considered and charged to be arbitrary and capricious, and the question of whether or not the Federal Administrative Procedure Act has a place in the federal system of banks and banking in the control of that done by the Comptroller.

Certiorari should be granted.

Respectfully submitted,

M. M. ROBERTS,
Post Office Box 870,
Hattiesburg, Mississippi.

M. M. ROBERTS,
Of Counsel.

M. D. BRETT,
Post Office Box 1071,
Hattiesburg, Mississippi.

PROOF OF SERVICE.

I, M. M. Roberts, of attorneys for petitioners and being a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Writ of Certiorari upon Honorable Carl Eardley, Acting Assistant Attorney General, Civil Division, United States Department of Justice, Washington, D. C.; Honorable Alan A. Rosenthal and Honorable Walter H. Fleischer, Attorneys, United States Department of Justice, Washington, D. C.; Honorable Robert E. Hauberg, United States Attorney, Jackson, Mississippi, counsel for respondent, and Honorable Francis T. Zachary, Attorney for Southern National Bank, Hattiesburg, Mississippi, dated this .... day of March, A. D., 1968.

M. M. ROBERTS,
Post Office Box 870,
Hattiesburg, Mississippi,
Of Attorneys for Petitioners.

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APPENDIX "A".

[R367] (TITLE OMITTED—FILED JAN. 19, 1967)

OPINION OF THE COURT.

This suit was instituted to review the action of the Comptroller in chartering a national bank at Hattiesburg, Mississippi. Thirteen business and professional people, without any banking knowledge or experience, sought and obtained a charter for Southern National Bank of Hattiesburg, Mississippi, with a capitalization of one million dollars.

The plaintiff is a state chartered bank in Hattiesburg. The trade territory served by the two banks in Hattiesburg, within a radius of fifteen miles, has an estimated population of fifty-seven thousand people. The new national bank was established and located within a half block of the main office of the Citizens Bank of Hattiesburg and of the First National Bank of Hattiesburg. Each of these two banks has three branch offices within the trade area and in Forrest County, Mississippi.

The Citizens Bank has a capital structure of one million, two hundred thirty-one thousand dollars with deposits of fourteen million, eight hundred ninety-three thousand dollars.

The First National Bank has a capital structure of two million, six hundred nineteen thousand dollars with deposits amounting to twenty-eight million, eight hundred ten thousand dollars. The two banks vigor-

ously opposed the creation of this new bank and contended that no need existed therefor and that business did not exist to support three banks.

[R368] The plaintiff contends that the action of the Comptroller was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. The Comptroller, on the other hand, contends that his action in creating this national bank was committed by Congress to his discretion and is not reviewable under 5 U.S.C.A., Section 1009. Both sides requested and were granted an informal hearing in Washington on April 16, 1965, but no record was made at the time.

The Comptroller contended that a hearing on such application was not required and with that view, the Court agrees. Much of the contentions here revolves around the erroneous supposition on the part of the contestants that they were entitled to an adversary type of hearing before the Comptroller on the question of the public convenience and necessity of another bank in this municipality.

A competent National Bank Examiner (Ramia) was duly dispatched to Hattiesburg where he spent three days investigating facts and circumstances to report to the Comptroller as to the propriety and necessity for this new bank.

In addition to the two banks and six branches thereof, there are five Savings and Loan Associations

in Hattiesburg with substantial capital structures. There were three banks in Hattiesburg until the 1933 depression, which resulted in the failure of one of them, and the survival of the present two banks.

No other banks have been chartered there in the intervening years, but the six branch banks have been created in recent years. The new national bank contended that the plaintiff bank was ultra conservative and that the other national bank was conservative and that a real need existed for commercial loans to large and small businesses, consumer credit installment loans, real estate, personal and construction loans.

They say substantial profits would increase over each of the first three years of business and the Examiner agreed with that forecast. The organizers pro- [R369] posed to purchase 45% of the stock and to widely distribute the balance of the stock with a limitation of two hundred shares to a stockholder.

The Examiner found from a random sampling of local opinions of business and professional men that another bank is desired although several people stated that the present banks were adequately serving community needs. The organizers were considered people of good standing in the community, but without banking knowledge or experience.

Four of the organizers owned a three story building which they proposed to sell to the bank at cost for its banking house. The Examiner approved the

capital structure and the investment in fixed assets. He viewed the management as marginal because they had no knowledge of or experience in banking.

The Examiner reported that a minor need existed for the establishment of another bank in the area saying: "The economy, together with the population, have shown consistent growth and it is believed that the bank, if approved, would be able to obtain its proportionate share of deposits and loans. It is not believed that the area would suffer to any noticeable degree if the proposed bank were disapproved."

As to the degree of need for the bank, the Examiner reported: "The steady growth of population, industry and business during the past decade and an apparent stable economy have afforded the conservative to ultra conservative existing banks steady growth; another bank in this area should not materially affect these existing banks and other lending institutions." The Examiner recommended that the application for this bank be disapproved.

In due course, this report was made by this Examiner to the Regional Comptroller in Memphis for review and recommendation. The Regional Comptroller (Robson), without any additional investigation, but after conferences with the organizers of the bank and examination and consideration of fiscal information available to him, the Regional Comptroller found that the projected deposit [R370] volume, loan volume, and net earnings are adequate to justify approval of the proposed bank.

The Regional Comptroller noted that a new bank had not been chartered in Hattiesburg for many years. "The area has prospered, continued growth appears likely, and in my opinion, a new bank is justified and will not materially effect (sic) existing banks. It is recommended that this application be approved."

The application was again reviewed and approved by the Organization Division of the department. It was again reviewed and approved by the Economic Division of the department. The Comptroller granted the charter on August 18, 1965, but his testimony showed that he knew nothing, personally or officially, about this matter.

The Congress has committed to the Comptroller of the Currency the power and authority to exercise a sound discretion to charter and put in operation national banks under 12 U.S.C., 1940 ed., Section 21 et seq. That statutory scheme does not expressly require the Comptroller to conduct an adversary hearing on an application for such a charter

He did not act arbitrarily or capriciously in denying an adversary hearing to either of the local banks as contestants of this application and in conducting a summary hearing as he did in this case. The decision of the Comptroller on such application is subject to review by the Court on a plenary action to a limited degree.

Judicial review is not precluded by 5 U.S.C.A. (Cumulative Supplement) Section 1009. The Banking Act does not preclude judicial review and does not provide that the exercise of the discretion therein committed to the Comptroller shall be absolute and final. On the other hand, it is clear from an examination of that section that this state chartered bank is entitled to judicial review of such action as a person affected thereby within the purview of Section 1009(a) and Section 1009(c). The scope of such review is limited by Section 1009(e).

[R371] The plaintiff state bank thus has standing in this Court to institute and maintain this suit for the review of such action of the Comptroller in granting this charter.

This suit cannot be used as a means for substituting the judgment of this Court for that of the Comptroller, but a summary and de novo hearing is envisioned within the statutory scheme to determine whether or not in effect this national bank has been illegally chartered.

That is the view expressed in a case from the Fourth Circuit involving the creation of a branch bank in *First National Bank of Smithfield v. Saxon*, (4CA) 352 F.2d 267, which appears as sound and convincing in this case involving the chartering of a new bank.

The plaintiff proffered the testimony of many bankers in this banking area to the effect that convenience and necessity and the best interest of the

community did not require and would not justify or support a new bank. That testimony was rejected by the Court because it is not relevant to the issue before the Court.

Likewise, the Comptroller injected into this record, over objection, some testimony as to the phenomenal experience of this bank in actual operation. That testimony is rejected by the Court as likewise being outside the range of the issue. The sole issue in this case is as to whether or not the Comptroller acted arbitrarily and capriciously and thus illegally in granting this charter to Southern National Bank of Hattiesburg, Mississippi, on August 18, 1965.

Significantly, even the National Bank Examiner found some need for a new bank. Every official who examined that record and reported his recommendation to the Comptroller said that there was enough business in existence and in prospect to support a new bank without injury to the eight banks in operation in the area.

This Court could not and would not subscribe to that view on this record with this completely inexperienced [R372] group of organizers of this new bank, but it is not within the province of this Court to decide that question on this record. It may not be gainsaid on this record that the Comptroller of the Currency did not act arbitrarily and capriciously and without substantial support and recommendation for the creation of this new bank.

Once it is determined by this Court that facts and circumstances exist on this record to bring into play the expertise of the Comptroller in making a choice as to disputed facts in the exercise of his discretion as to whether or not a new bank would be chartered, then the function of this Court is at an end.

The Comptroller has exercised such a discretion in this case in creating this new bank and his action was not arbitrary, capricious or an abuse of discretion or otherwise not in accordance with law. He simply reached a conclusion not shared in any degree by this Court, but his action was surely not illegal, and this new bank was validly created.

It is the view of this Court that it has full jurisdiction of the parties and the subject matter to do all that is herein done under the Administrative Procedure Act, appearing as 5 U.S.C., Section 1001 et seq. (Cumulative Supplement). There is nothing in the National Banking Act, appearing at 12 U.S.C., 1940 ed., Section 21 et seq. which requires the Comptroller of the Currency to conduct an adversary hearing on an application for a new national bank.

His decision, however, is reviewable in this Court for a determination as to its legality vel non. Any person adversely affected by such a decision may institute an action for the review of such decision. The action for a review, while adversary in nature, may be summary in fashion for a determination as to whether or not facts and circumstances before the

Comptroller afforded him an alternative for the exercise of a sound discretion in doing that which he did.

The Court may not substitute its judgment for [R373] that of the Comptroller under the National Banking Act. The function of the Court is at an end when it is determined that the Comptroller has exercised a sound discretion based upon his expert judgment as to the existence or not of a public convenience and necessity for the new bank. He did that in this case albeit in disagreement with and even contrary to the best judgment of others, including this Court.

The Court has heard and considered this case on its merits. The motion of the defendant for a summary judgment will be overruled. All other pending motions will likewise be overruled. The complaint of the Citizens Bank of Hattiesburg is without merit and will be dismissed A judgment accordingly may be presented.

(S) HAROLD COX,
United States District Judge.

January 18, 1967.

APPENDIX "B".

[R374] (TITLE OMITTED—FILED JAN. 24, 1967)

FINAL JUDGMENT.

This action came on for hearing on a former date and was taken under advisement by the Court. All parties have submitted memoranda of authorities herein and the Court, after considering the law and evidence rendered a written opinion dated January 18, 1967, which has been filed in the records of this cause and the provisions of which are incorporated herein by reference.

It is, therefore, ordered and adjudged that the plaintiff take nothing by this action and that the complaint is hereby dismissed with prejudice. Let no costs be taxed herein.

ORDERED AND ADJUDGED this 23rd day of January, 1967.

(S) HAROLD COX,
United States District Judge

APPENDIX "C".

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24568

CITIZENS BANK OF HATTIESBURG, M. D. BRETT and J. W. MANGUM,

Appellants,

versus

WILLIAM B. CAMP, Comptroller of the Currency of the United States,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(December 4, 1967.)

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The Citizens Bank of Hattiesburg and two stockholders of the First National Bank of Hattiesburg seek a declaratory judgment that the approval by the Comptroller of the Currency of the application for the chartering of the Southern National Bank of Hattiesburg as a new national bank was unlawful. Pursuant to a full and able opinion, the district court dismissed the complaint.

We need not decide the question of whether a competing bank and stockholders of a second competing bank have standing to challenge the chartering of a new national bank for, assuming such standing arguendo, we agree with the district court that the complaint is without merit.

The present applicable statutes[1] and regulation[2] do not require the Comptroller to hold a formal adversary hearing in determining whether to approve the chartering of a new national bank.[3] The action of the Comptroller is not subject to review by trial de novo.[4] The court may not substitute its judgment for that of the Comptroller.

Upon the present record we cannot hold that the Comptroller denied the appellants a full and fair opportunity to oppose the granting of the charter, that he acted arbitrarily or otherwise illegally. We find no substance in appellants' other contentions. The judgment is AFFIRMED.

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1 12 U.S.C.A. §§ 21, 22 and 26.
2 12 C.F.R. 4.2.
3 Webster Groves Trust Co. v. Saxon, 8 Cir. 1966, 370 F.2d 381; 1 Davis, Administrative Law Treatise §4.04.
4 See authorities cited in note 3.

APPENDIX "D".

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24568

D. C. Docket No. CA 1998

CITIZENS BANK OF HATTIESBURG, M. D. BRETT and J. W. MANGUM,

Appellants,

versus

WILLIAM B. CAMP, Comptroller of the Currency of the United States,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Citizens Bank of Hattiesburg, M. D. Brett and J. W. Mangum, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 4, 1967

Issued as Mandate:

APPENDIX "E".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 24568

CITIZENS BANK OF HATTIESBURG, M. D. BRETT and J. W. MANGUM,

Appellants,

versus

WILLIAM B. CAMP, Comptroller of The Currency of The United States,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING EN BANC

Before RIVES and GODBOLD, Circuit Judges, and HUGHES, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

APPENDIX "F".

12 U.S.C.A., Sections 26 and 27

§ 26. Comptroller to determine if association can commence business

Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this chapter, and the association transmitting the same notifies the comptroller that at least 50 per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this chapter required to be complied with before an association shall be authorized to commence the business of banking, the comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this chapter required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the comptroller to determine whether the association is lawfully entitled to commence the business of banking. R.S. § 5168.

§ 27. Certificate of authority to commence banking

If, upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the comptroller may withhold from an association his certificate authorizing the commencement of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this chapter. R.S. § 5169.

APPENDIX "G".

§ 36. Branch banks

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving

and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a paid-in and unimpaired capital stock of not less than $500,000: *Provided*, That in States with a population of less than one million, and which have no cities located therein with a population exceeding one hundred thousand, the capital shall be not less than $250,000: *Provided*, That in States with a population of less than one-half million, and which have no cities located therein with a population exceeding fifty thousand, the capital shall not be less than $100,000.

APPENDIX "H".

12 U.S.C.A., Section 36(c)

§ 554. Adjudications

(a) This section applies, accordingly to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 384.

5 U.S.C.A., Sections 554 and 556

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

Ths subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplication of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accord-

ance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 386.

APPENDIX "I".

5 U.S.C.A., Sections 702 and 703.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

APPENDIX "J".

CONSTITUTION OF THE UNITED STATES

Amendment V. Due Process of Law.

"* * * nor be deprived of life, liberty, or property, without due process of law; * * *."

Amendment V. Just Compensation for Property.

"* * * nor shall private property be taken for public use, without just compensation."

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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APR 17 1968

No. 1258

In the Supreme Court of the United States

OCTOBER TERM, 1967

CITIZENS BANK OF HATTIESBURG, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1239

CITIZENS BANK OF HATTIESBURG, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, Comptroller of the Currency of the United States

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

1. Petitioners sought a declaration that the approval by the Comptroller of the Currency of an application for the chartering of the Southern National Bank of Hattiesburg, a new national bank, was unlawful, and an injunction compelling the Comptroller to "withdraw and cancel [the] certificate of authority" granted by him to that bank. On January 24, 1967, the district court dismissed the complaint, ruling that the Comptroller's action in approving the application

was not arbitrary, capricious, an abuse of discretion, or lacking in an evidentiary basis (Pet. Apps. A and B, 27-36). The court of appeals affirmed, in a *per curiam* opinion (Pet. App. C, 37-38).[1]

On January 7, 1965, an application to organize the Southern National Bank, to be located in Hattiesburg, Mississippi, was filed with the Comptroller. The application was supported by a brief discussing in detail the economy of the area, the status of existing financial institutions, financial competition in the area, and the proposed economic structure, physical structure and operating policies of the new bank. A volume of exhibits also was submitted, containing statistical data on the population of the area and its projected growth, retail trade in the area, industrial and governmental employment, and the general financial situation of the community.

Among the points made by the proponents of the new bank, were that the population in Hattiesburg had grown steadily, a trend projected to continue for many years; that retail sales and the assessed value of land had risen sharply in recent years; and that a growing university was located in the community. The proponents noted that, notwithstanding this economic growth, no bank had been chartered in Hattiesburg since 1902, when petitioner Citizens Bank of Hattiesburg was organized.[2]

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[1] A petition for rehearing was denied by the court of appeals on January 18, 1968 (Pet. App. E, 41).

[2] The only other bank in Hattiesburg had been organized in 1895.

The investigation of the proposal was assigned to a national bank examiner, who, on the instructions of the Regional Comptroller, called upon the two existing banks to give them the opportunity to express their views. Officials of these banks conferred with the examiner, and lodged lengthy written oppositions with the Office of the Comptroller (see R. 160-174). The Comptroller's office also wrote petitioner Brett, the President of Citizens Bank, that "[i]f you wish to submit any other data or be accorded a hearing in this Office, we shall be happy to meet with you here in Washington" (R. 175-176). Such a hearing was arranged for April 16, 1965 (R. 178). Prior to the hearing, Citizens Bank requested that it be furnished with the application of the proponents, and the materials supporting it (R. 179-180). This request was granted (R. 181), except for the omission of confidential financial and biographical information concerning the organizers (R. 703-704).[3]

At the hearing, Mr. Brett propounded at great length [4] his view that a new bank was not needed in Hattiesburg. The President of the other existing bank, the First National Bank, also spoke in opposition to the proposal. Counsel for the proponents spoke in its favor. On the day of the hearing, Citizens Bank also

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[3] In addition, a list of proposed shareholders was omitted. The omitted material was submitted to the district court for *in camera* inspection.

[4] Although, as stated in the petition (p. 8), it was announced that each side would have 15 minutes, in fact the hearing lasted much longer, and the Deputy Comptroller who presided recorded in a memorandum of the hearing, that the President of Citizens Bank spoke "at great length."

submitted lengthy written oppositions to the proposal (R. 182-212, 267-278). At the close of the hearing, the opponents were granted until April 29, 1965, to file further materials. On April 27, 1965, Citizens Bank did submit further extensive written statements and exhibits (R. 214-239).

On May 28, 1965, upon the recommendations of his staff, the Comptroller gave preliminary approval to the application.[5] On August 18, 1965, after the new bank complied with technical and legal requirements, it was authorized to commence business (R. 637-640).

2. Apart from the question of petitioners' standing to maintain this action, on which the court of appeals did not pass (Pet. App. C, 37-38),[6] the present petition appears to raise two issues: (1) whether the Comptroller of the Currency in acting upon an application for a new bank charter must conduct an adversary hearing of the kind contemplated by Section 7 of the Administrative Procedure Act (5 U.S.C. (Supp. II) 556); and (2) whether a determination of the Comptroller approving a new bank charter is subject to review by a trial *de novo*. Both courts below correctly rejected petitioners' contention on these issues.

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[5] The national bank examiner recommended against approval of the charter, but the remainder of the Comptroller's staff was unanimous in recommending approval.

[6] Petitioners make reference (Pet. 9) to the cases relied upon by the respondent in the court below in support of the position that, as mere prospective competitors of the proposed new bank, petitioners lacked sufficient standing to challenge the Comptroller's action in granting the charter. *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, relied on by petitioners (Pet. 10), is plainly distinguishable (see 390 U.S. at 5-7).

Contrary to petitioners' suggestion (Pet. 13), there is no conflict among the circuits, and no occasion for further review. The decision below indeed is in complete accord with the only prior appellate decision in a similar bank charter case, *Webster Groves Trust Co.* v. *Saxon*, 370 F. 2d 381 (C.A. 8).[7]

a. It is settled that the Comptroller need not hold a formal adversary hearing before acting upon applications of this nature. *E.g.*, *Webster Groves Trust Co.* v. *Saxon, supra*, 370 F. 2d at 384-385; *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d 267, 270 (C.A. 4); 1 Davis, *Administrative Law Treatise*, § 4.04. The Administrative Procedure Act requires the kind of formal adversary hearing specified by Section 7 of that Act (5 U.S.C. 556) only in certain rulemaking proceedings (see 5 U.S.C. 553), and in cases "of adjudication required by statute to be determined on the record after opportunity for an agency hearing" (5 U.S.C. 554). The chartering of a new national bank does not involve an adjudication required to be made after a formal agency hearing. Indeed, the governing statute, 12 U.S.C. 27, provides merely that the Comptroller may examine the facts "by means of a special commission appointed by him for the purpose of inquiring into the condition of such [national banking] association, or otherwise." When the APA was enacted the Attorney General's Advisory Committee on Administrative Procedure cited

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[7]Another district court has reached a simliar result. *Warren Bank* v. *Saxon*, 263 F. Supp. 34 (E.D. Mich.). An appeal is pending in that case (C.A. 6, Nos. 17718-17719).

such determinations by the Comptroller, as an example of agency action not required to be made after an adversary hearing. *E.g.*, S. Doc. No. 8, 77th Cong., 1st Sess., p. 143; Monograph of the Attorney General's Committee on Administrative Procedure on Federal Control of Banking, S. Doc. No. 186, 76th Cong., 3d Sess., Part 13, p. 12.

b. Petitioners also challenge (Pet. 14-15, 20) the ruling below that the Comptroller's authorization of the charter was not subject to review by a trial *de novo*. Petitioners proffered in the district court the testimony of several bankers to the effect that the new bank, though it had proved successful beyond expectations (Def. Exh. 3), had not been needed in the community. This testimony was properly rejected. Petitioners had a full opportunity to—and did in fact—present to the Comptroller extensive written materials opposing the application (R. 160-174, 182-212, 213, 214-231, 231-239, 266-278), as well as to give their views at the informal oral hearing in the Office of the Comptroller. Prior to the hearing, petitioners were given the application of the proponents of the new bank, and the supporting economic data (with the exception of confidential financial information concerning the organizers) (R. 179-181).

There was, accordingly, no basis for the district court to conduct a *de novo* trial. Ordinarily a party which has had a fair opportunity to present its objections to an administrative agency may not overturn the agency action on the basis of materials, or grounds, not presented to the agency. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37. Moreover,

no statute provides for *de novo* review.[8] Instead, the chartering of new national banks, since the passage of the National Bank Act in 1864 (13 Stat. 99), has been considered an area over which the Comptroller has broad discretion in coming to a decision dependent upon "a congeries of imponderables * * * calling for almost intuitive special judgments" (S. Doc. No. 8, 77th Cong., 1st Sess., p. 143). It clearly would be destructive of that broad discretion for the district courts to decide independently whether bank charter applications should or should not be granted.[9]

The only previous appellate decision directly in point, *Webster Groves Trust Co.* v. *Saxon, supra*, also holds "that the action by the Comptroller is not

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[8] Indeed, no statute provides for *any* review of the Comptroller's authorization of a new bank charter. Contrast the situation under the Bank Merger Act of 1966, which provides (12 U.S.C. (Supp. II) 1828(c)(7)(A)) that "the court shall review de novo the issues presented." See *United States* v. *First City Nat'l Bank*, 386 U.S. 361. Even where Congress has provided for review, "the reviewing function is one ordinarily limited to consideration of the decision of the agency * * * and of the evidence on which it is based * * * and * * * no *de novo* proceedings may be held." *United States* v. *Bianchi & Co.*, 373 U.S. 709, 714-715.

[9] Petitioners confuse the holding below that the Comptroller's action is not subject to review by a trial *de novo*, with a holding that the action is not subject to review at all. The court below did not adopt the latter view; rather, it held on review of the record that the Comptroller's action was not arbitrary or illegal (Pet. App. C, 37-38). Without deciding the precise scope of review which pertains to a bank charter case, the court below ruled that petitioners could not prevail on a scope of review at least as broad as that specified in *Webster Groves Trust Co.* v. *Saxon, supra*, 370 F. 2d at 387-388.

subject to trial *de novo*" (370 F. 2d at 387). Nor do the cases relied upon by petitioners conflict with the decision below. Both upheld a *de novo* review of the Comptroller's approval of an application for a branch bank, in circumstances in which the Comptroller had refused to make available most or all of his administrative files to either the opponents of the application or the reviewing court. *First National Bank of Smithfield, North Carolina* v. *Saxon*, 352 F. 2d 267, 272-273 (C.A. 4); *Peoples Bank of Trenton* v. *Saxon*, 373 F. 2d 185, 188-189 (C.A. 6). Lacking an administrative record on which it could be determined whether there was a rational basis for the agency action, the reviewing courts undertook to investigate the facts *de novo*. However, as the present case indicates, the Comptroller's practice has been significantly revised since those decisions were rendered.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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